In the Supreme Court of the United States.

OCTOBER TERM, 1910.

WILLIAM BROWN and LEVI B. GRITTS, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, Appellants,

v.

THE UNITED STATES.

No. 331.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This appeal is from a judgment of the Court of Claims dismissing an action brought by appellants in that court to determine the validity of certain acts of Congress restricting the power of Indians to alienate their lands.

Brown and Gritts are full-blood Cherokee Indians. They received allotments of land from the United States under the act of July 1, 1902 (32 Stat., 716),

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which provided for the distribution of a portion of the Cherokee tribal property. Each received both homestead and surplus lands, and Brown received in addition an allotment by inheritance from his son—all under the provisions of the act of July 1, 1902. That act forbade the alienation of homesteads under it during the lifetime of the allottee, not exceeding twenty-one years, and of other lands during the period of five years.

After the passage of the act of July 1, 1902, while all its provisions were still in force, and before Brown or Gritts had attempted to alienate any of their lands, or had brought this suit, Congress passed two other acts for the protection of Indian allotments. The first of these was the act of March 11, 1904 (33 Stat., 65), which empowered the Secretary of the Interior to grant rights of way for pipe lines over lands allotted to Indians under certain regulations. The second was the act of April 26, 1906 (34 Stat., 137), which extended to a period of twenty-five years the time within which all full-blood Indians of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole tribes were forbidden to alienate, sell, dispose of, or encumber any of their lands.

Brown and Gritts are seeking to have this legislation of 1904 and 1906 annulled by the courts and to have the lands allotted to them under the original act of July 1, 1902, adjudged to be free from all restraints upon alienation. They bring this suit under the provisions of certain sections of the Indian appropriation bill of March 1, 1907 (34 Stat., 1015),

which undertook expressly to authorize these appellants to institute actions in the Court of Claims to determine the validity of any acts of Congress passed since the act of July 1, 1902, in so far as such later acts of Congress increase or extend the restrictions upon the alienation of Cherokee allotments, with an appeal to the Supreme Court of the United States to hear and determine the question of such validity.

In this brief we shall set out:

First, the pertinent provisions of all the acts of Congress involved;

Second, the important findings of fact by the Court of Claims; and

Third, the argument for the Government, in which it will be contended (*a*) that the case is moot, and (*b*) that upon the merits the judgment of the court below should be affirmed and the petition dismissed.

I.

Pertinent provisions of the acts of Congress involved.

The act of July 1, 1902 (32 Stat., 716, 717, 726, 727, ch. 1375, secs. 13, 14, 15, 20, and 72), relates to the allotment and alienation of all lands belonging to the Cherokee Tribe of Indians in Indian Territory, except such as are reserved from allotment, and the pertinent sections are as follows:

> SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allotable lands of the Cherokee Nation, as

nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent (34 Stat., 717).

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of the descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If,

however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted (34 Stat., 718).

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands (34 Stat., 726, 727).

Of the same general character with the act of July 1, 1902, but differing in some features of their restrictions upon alienation, there were passed certain other acts for the allotment and protection of Indian lands at about the same time. Among these is the Seminole act of July 1, 1898 (30 Stat., 567, 568, ch. 542); the Creek act of March 1, 1901 (31 Stat., 861, 862, 863, ch. 676, sec. 7); the Supplemental Creek act of June 30, 1902 (32 Stat., 500, 503, ch. 1323, sec. 16); and the Choctaw and Chickasaw act of July 1, 1902 (32 Stat., 641, 642, 643, ch. 1362, secs. 12, 16).

The act of March 11, 1904 (33 Stat., 65, ch. 505), which is one of the statutes whose validity is challenged in this case, related to all the Five Civilized Tribes, and the pertinent provisions are as follows:

> That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through . . . any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas

> wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company. . . . *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. (33 Stat., 65, ch. 505.)

Another act of 1904 (April 21, 1904, 33 Stat., 189, 204, 205, ch. 1402), while not directly involved in this case, is important as distinguishing restrictions between members of the Five Civilized Tribes, including Cherokees, who are of Indian blood and members of such tribes who are not of Indian blood, thus indicating that Congress was coming to realize that the degree of Indian blood was a proper basis of classification in imposing restrictions upon the alienation of lands, those of Indian blood being regarded as needing greater protection against the improvident alienation of their allotments than other classes within the tribes. This statute also authorized the removal of all restrictions, except as to minors and except as to homestead lands, with the approval of

the Secretary of the Interior, under such rules and regulations as he might prescribe, and under this act the restrictions upon the alienation of a part of the surplus lands of the appellant Brown and upon all the surplus lands of the appellant Gritts had been in fact removed when this suit was brought in the Court of Claims (Finding XI, 44 Court of Claims Reports, p. 293, Rec., 26, 27). The pertinent provisions of this act are as follows (33 Stat., 204, ch. 1402):

> And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded.

The act of April 26, 1906 (34 Stat., 137–148; ch. 1876, secs. 19, 20, 22, and 23), the validity of which is also challenged in this case, put the law in its latest

form before the present suit was begun, and the relevant part of this statute reads:

> SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed;

but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee (34 Stat., 144).

SEC. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further*, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory (p. 145).

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and

convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe (p. 145).

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner (p. 145).

The act of March 1, 1907 (34 Stat., ch. 2285, pp. 1015, 1028), which is the jurisdictional act expressly authorizing the appellants Brown and Gritts to bring this suit for the purpose of testing the validity of all acts of Congress passed since the original allotment of the Cherokee lands by the act of July 1, 1902, in so far as such later acts increase or extend the restrictions

upon alienation, is to be found in the Indian appropriation bill of March 1, 1907, and reads as follows:

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the Act of July first, nineteen hundred and two, entitled "An Act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any Acts of Congress passed since the said Act of July first, nineteen hundred and two, in so far as said Acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said Act of July first, nineteen hundred and two.
>
> And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

> The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.
>
> Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said Act of July first, nineteen hundred and two. (34 Stat., 1028.)

After this jurisdictional act was passed, and after this suit had been commenced under it, Congress passed the act of May 27, 1908 (35 Stat., 312, 315, ch. 199, secs. 1, 2, 8, and 9). This last act on the subject of alienation of Indian lands provides that all lands, including homesteads, of intermarried whites and of mixed-blood Indians having less than half Indian blood, among the Five Civilized Tribes (including Cherokees), shall hereafter be free from all restrictions on alienation or incumbrance; and that all lands, except homesteads, of mixed-blood Indians

having half or more than half and less than three-quarters Indian blood, among such tribes, shall be free from such restrictions; but that all homesteads of mixed-blood Indians having half or more than half Indian blood, and *all allotted lands of full-blood Indians or of mixed blood of three-quarters or more Indian blood shall not be subject to alienation or any incumbrance prior to April 26, 1931*, except with the approval of the Secretary of the Interior, and *all inherited lands shall not be subject to alienation except with the approval of a court having jurisdiction of the estate of the allottee.*

This last act of Congress on the subject expressly continues the restrictions upon the alienation of any lands held by a full-blood Indian of either of the Five Civilized Tribes. The appellants Brown and Gritts belong to this class. Under the original allotment act of July 1, 1902, these full-blood Indians could not alienate their homesteads for twenty-one years, nor any other lands, whether allotted to them or inherited, during the period of five years. (See secs. 13, 14, and 15 of the act of July 1, 1902.) Under the act of April 26, 1906, these full-blood Indians could not alienate any lands allotted to them, for a period of twenty-five years, nor any lands inherited by them, except with the approval of the Secretary of the Interior. (See secs. 19 and 22 of the act of April 26, 1906.) So, under this last act of May 27, 1908, these full-blood Indians can not alienate any lands allotted to them before April 26, 1931, except with

the approval of the Secretary of the Interior, nor any lands inherited by them unless approved by a court having jurisdiction of the settlement of the estate of the deceased allottee. (See secs. 1 and 9 of the act of May 27, 1908.)

This act of May 27, 1908, was passed after the jurisdictional act of March 1, 1907, which authorized the bringing of this suit, and after this suit was begun. It expressly continues the restrictions upon the alienation of all lands held by any full-blood Indian of either of the Five Civilized Tribes, including the Cherokees, and including the appellants Brown and Gritts, and neither this act itself nor any legislation of Congress authorizes the bringing of any suit to test the validity of the act of May 27, 1908. The pertinent provisions of that act are as follows:

> SEC. 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than

half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma (35 Stat., 312).

SEC. 2. That all lands other than homesteads allotted to members of the Five Civil-

ized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further,* That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years (35 Stat., 312, 313).

SEC. 8. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of the said section, the words "or a judge of a county court of the State of Oklahoma."

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of

said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section. (35 Stat., 315).

II.

Important findings of fact by the Court of Claims.

The facts in this case are to be ascertained solely from the findings of the Court of Claims, for all allegations in the petition were denied by the United States. (Rec., 14.)

The most important of these findings of fact are as follows, designating them by the numbers used in the court below (Rec., 19, *et seq.*):

I. Of the total tract of land (14,375,125 acres) conveyed to the Cherokee Nation under the treaties of February 14, 1833, and December 29, 1835, there remained undivided as the property of that nation until the act of July 1, 1902, providing for allotments, was passed, 4,420,000 acres.

II. When the Indian roll of the Cherokee Nation was completed on March 4, 1907, it contained the names of 41,798 Cherokees, of whom 8,698 are of the full-blood.

III. The act of July 1, 1902, providing for the allotment of lands of the Cherokee Indians, was submitted to a vote of the Cherokee people, ratified on August 7, 1902, and the ratification thereof certified and proclaimed on August 12, 1902.

(Findings IV and V refer to the completion of the allotments and set out the forms of certificates and patents issued.)

VI. Under the provisions of the act of July 1, 1902, there were allotted to the appellants Brown and Gritts certain tracts of lands as their homesteads,

and there were also set apart and allotted to each of them, in accordance with the said act, certain other tracts of land designated as "surplus allotments."

(Finding No. VII merely recites the terms of the act of March 11, 1904, with respect to rights of way for pipe lines through Indian lands; No. VIII contains the pertinent sections of the act of April 26, 1906, with respect to the alienation of lands; No. IX finds that the Secretary of the Interior has prepared and promulgated certain regulations under the act of April 26, 1906; and No. X recites the jurisdictional act of March 1, 1907, under which this suit was brought.)

XI. The court finds that William Brown and Levi B. Gritts, the petitioners below, and the appellants here, are the identical persons named in the jurisdictional act of March 1, 1907; are enrolled as full-blood citizens of the Cherokee Nation, and have received allotment certificates and patents for their respective shares of Cherokee tribal lands under the act of July 1, 1902; and that William Brown inherited an allotment of land from his son who was an original allottee under the act of July 1, 1902.

XII. The court finds that *Brown and Gritts have never been granted any authority to represent the Cherokee Nation or any of the enrolled citizens thereof*, except as provided by the terms of the jurisdictional act of March 1, 1907.

(Finding No. XIII goes merely to the fact that the lands of Brown and Gritts are suitable for grazing and agricultural purposes only.)

XIV. The court finds that notwithstanding the institution of this suit by Brown and Gritts, *the full-blood citizens of the Cherokee Nation to whom lands have been allotted are in the main in favor of the extension of the period of restriction upon alienation*, and are in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands, as they are uneducated and unable to speak the English language and, without governmental supervision, are *incompetent to represent and protect themselves in the sale or leasing of their allotted lands.*

(Finding No. XV states that before the commencement of this suit the appellant Brown had filed in the Supreme Court of the District of Columbia a bill attacking the validity of the act of April 26, 1906.)

XVI. The court finds that prior to the passage of the act of April 26, 1906, the validity of which is challenged in this case, *many full-blood Indians of the Cherokee Nation had been induced by designing persons to execute deeds of their allotted lands and otherwise to encumber their allotments*, in violation of the act of July 1, 1902, *at grossly inadequate compensation;* and that since the passage of the act of April 26, 1906, large numbers of such deeds, in violation of that act, are being filed almost daily in the offices of the recorders of deed of the counties of Oklahoma, and suits have been brought by the United States to cancel such deeds, embracing 25,338 transactions of this character.

III.

ARGUMENT.

A.

This case is moot and there is nothing upon which a judgment of the court can operate.

Before discussing the merits of the controversy presented by this appeal, to wit, the constitutional power of Congress to extend the restrictions upon the alienation by full-blood Cherokee Indians of their allotted or inherited lands, we desire to call attention to an important question which arises at the very threshold of the case.

The sole authority for the bringing of this suit is a certain provision in the Indian appropriation bill of March 1, 1907. (34 Stat., ch. 2285, pp. 1015, 1028.) An examination of that provision (Rec., 26) and of the form and contents of the petition and prayer filed under it (Rec., 1–12) will clearly show that this case presents merely a moot question to the court.

The case is moot for two reasons:

First. *Because it merely asks the judgment of the court upon the constitutionality of certain acts of Congress and presents nothing upon which that judgment can operate; and*

Second. *Because the inquiry is limited to acts of Congress passed between July 1, 1902, and March 1, 1907 (when the act authorizing this suit was passed), and since that date Congress has by the act of May 27, 1908, renewed*

and extended substantially the same restrictions upon the alienation of Cherokee lands involved, and these restrictions would still be in force whatever the judgment might be in the present case.

As to the first reason, it will be observed that the appellants Brown and Gritts have not attempted to alienate or encumber their lands contrary to the provisions of the acts here involved. No deed, mortgage, lease, or other conveyance is involved. No rights of third parties have intervened. This is not a suit to quiet title, or in mandamus to require a recorder of deeds to register a transfer of land, or in specific performance under a contract to sell, or for the purchase price of property sold. The whole purpose of the suit, as declared in the act authorizing it, is "to determine the validity of any acts of Congress passed since the said act of July 1, 1902, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens."

In other words, Congress, in 1902, having passed an act providing for the allotment in severalty of Cherokee lands to members of the Cherokee tribe, with restrictions upon the rights of the allottees or their heirs to alienate such lands, and having, in 1904 and 1906, passed other acts affecting such lands, proceeds in 1907 to authorize a special suit to be brought submitting to the courts the question as to the validity of its previous legislation. While in form this action

makes the United States defendant, in substance it presents nothing more than the curiosity of Congress to find out whether or not certain of its acts are constitutional. So far as the essence of the case is concerned it might with equal propriety be presented to the Court of Claims, and ultimately to this court, in the form of a resolution of Congress submitting to the judicial branch of the Government the question as to the effect and validity of certain acts of the legislative branch.

The pleadings and all the circumstances connected with this suit, as disclosed by the record, show conclusively that it is in no sense an adversary proceeding in which any of the parties to it have an actual present interest. And, even if they had some property right immediately threatened, we submit that there are appropriate remedies and courts provided by general laws for the enforcement of such rights. Litigation of the character presented by this case ought not to be encouraged. Here we have, not a suit at law or in equity in which a judgment can be rendered for the recovery of some claim, or commanding or restraining some act, but simply an academic question submitted to the court. Nor will it do to say that the petitioners below had already brought an action in the Supreme Court of the District of Columbia against the Secretary of the Interior (Rec., 9–10) to enjoin that officer from carrying into effect regulations in furtherance of the acts of Congress extending restrictions upon the alienation of the Indian lands here involved, and that the present case

is merely substituted for the former one which might have been prosecuted. The answer to this is, that the court can not here inquire into the sufficiency of the cause of action set up in the injunction suit, if any cause of action there existed, and, further, that, even if the appellants in the present case could have maintained a real suit in some court, this fact does not justify the bringing of a moot case in another court.

More than this, it appears from the jurisdictional act itself, under the authority of which the case at bar was begun, that Congress did not intend to substitute a new action against the United States for the one already pending in the District Supreme Court against the Secretary of the Interior. The act authorizing the present proceeding does not mention the other case, nor require the dismissal of it. In fact, the jurisdictional act merely permits and empowers Brown and Gritts to bring this present proceeding, and the record shows (Rec., 10) that the injunction suit was left pending when the jurisdictional act was passed. It follows, therefore, that even if these appellants have a cause of action to determine the validity of the acts of Congress involved the place to assert it is not in this case, where they are merely asking the opinion of the courts, but in the injunction suit, in which they are at least asking a judgment.

This unusual and, we think, unwarranted method of testing the validity of acts of Congress ought not to be sanctioned, not only because it attempts to impose upon the courts duties inconsistent with the limitations of judicial power as defined by the Consti-

tution, but because if Congress may, by resolution or act, submit to this court questions as to the construction or validity of its own legislation, it may often happen that the most numerous class of those who are really interested in and affected by the legislation will not be parties to the suit.

In the case at bar public funds are to be expended for the presentation of both sides of the question involved, and though a portion of these funds is held by the United States in trust for the beneficiaries under the Cherokee Allotment Act (Rec., 26), it appears that *the full-blood Cherokee Indians "are in the main in favor of the extension of the period of restriction upon the alienation" of their lands* and are *"in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands,"* as provided for in the very act whose validity is here attacked. (Rec., 28.) And not only does no Cherokee Indian join the appellants in this suit, but the Cherokee Nation, through its principal chief, and its attorney in fact, has intervened in this proceeding and states to the court that the Cherokee Nation being "directly interested in protecting its own citizens, particularly the less educated and more dependent class, the full-blood citizens," desires to have the constitutionality of the acts here complained of sustained and says that the appellants herein "do not represent the Cherokee Nation or any of the enrolled citizens thereof, other than themselves, and are without authority to appear for or to represent any of them " (Rec., 18.)

It is not meant to suggest here any question as to the good faith of those who have brought this proceeding, or secured the passage of the special act which authorizes it, but it is submitted that a mere friendly suit arranged for the sole purpose of presenting a question of law by Congress to the courts, without the intervention of any parties who assert a present cause of action, is a moot case, and no jurisdiction of it should be accepted.

The second reason why this case is moot is shown by the fact that Congress itself after the passage of the act authorizing this suit and after this suit was begun, that is to say on May 27, 1908 (35 Stat., 312, 315), passed another act providing that no allotted lands of full-blood Cherokee Indians shall be alienated or encumbered prior to April 26, 1931, and that no inherited lands of such Indians shall be alienated except with the approval of a court having jurisdiction of the estate of the allottee.

It follows, therefore, that even if the act of April 26, 1906 (34 Stat., 137–148), which extended previous restrictions, should be held unconstitutional, there would still continue substantially the same restrictions under the act of 1908, which are not and can not be attacked in this case. In effect, the act of 1908, further extending the restrictions upon the alienation of Cherokee lands, repeals the act of 1906 so far as alienations in the future are attempted and repeals the jurisdictional act of March, 1907, under which the present suit was brought. In other words, we have this situation: Congress in one year passes a

certain act respecting the alienation of Indian lands, the next year it passes another act providing for a test in the courts of the constitutionality of the first act, and then in the third year passes still another act reestablishing practically the same restrictions, without authorizing any suit to test their validity. This clearly demonstrates not only that the present case is moot and nothing would be accomplished by a decision of it, but that Congress itself now considers the whole matter moot.

B.

Upon the merits the judgment below, dismissing the petition, should be affirmed.

Upon the merits of the case the Government contends that the acts of Congress the constitutionality of which is here challenged, to wit, the act of March 11, 1904 (33 Stat., 65, ch. 505), authorizing the Secretary of the Interior to grant rights of way for pipe lines over Indian lands, and the act of April 26, 1906 (34 Stat., 137–148), extending the restrictions upon the alienation of certain Cherokee lands, were a valid exercise of the power of Congress in the protection of the Indians and their property.

First, as to the act of March 11, 1904. It may well be doubted whether in the jurisdictional act authorizing this suit it was ever intended to have questioned the validity of the Interior Department's regulations with respect to pipe lines. The jurisdictional act, it will be recalled (Rec., 26), authorizes the appellants Brown and Gritts to institute suit in the Court of

Claims "to determine the validity of any acts of Congress" passed since the original allotment act of July 1, 1902, "in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens."

Now this act of March 11, 1904, authorizing the Secretary of the Interior "to grant a right of way in the nature of an easement, for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas" through lands allotted to individual Indians, can scarcely be called a restriction upon alienation unless it be in the sense that the Indian allottee can not thereafter grant the same right of way. The authorization of pipe line rights of way is rather an allowance of alienation than a restriction upon it, and the act authorizing this suit proposes a test of the validity of such acts only as limit the right of the Indian allottee to dispose of his lands. In any event, the act authorizing rights of way for pipe lines over Indian lands is peculiarly for the benefit and protection of the Indian owner. The moneys received therefrom are paid to the allottee, and when the rights of way run through unallotted lands the damages are paid into the tribal funds. For the construction of lateral lines, which may be done without the approval of the Secretary of the Interior, there must be secured the consent of the allottee himself. In no respect does this act impose the slightest hardship or deprivation upon the Indian allottee. It is all designed in his interest

alone. But aside from this, it seems quite clear that the act as to pipe lines is not before the court, for the reason that Congress did not submit any question on that subject.

Next, as to the act of April 26, 1906. This is the only statute whose constitutionality is actually involved in this proceeding. It is set out in full in the statement, *supra*. In brief, and in so far as this case is concerned, it provides that no full-blood Indian of the Cherokee Tribe shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him, for a period of twenty-five years from and after the passage and approval of the act, and that no full-blood adult heir of any deceased Cherokee Indian shall have power to convey the lands inherited except with the approval of the Secretary of the Interior. The only difference between this act and that of July 1, 1902, under which the original Cherokee allotments were made, and under which the appellants, Brown and Gritts, secured their lands, is that the act of 1902 made the period of restrictions upon the alienation of surplus lands five years, whether held by the allottee or his heirs, and upon the alienation of homesteads twenty-one years, while the act of 1906 fixes the limit on all lands held by the allottee, whether homestead or surplus lands, at twenty-five years, and authorizes the conveyance of lands by the heirs of an allottee upon the approval of the Secretary of the Interior. As pointed out heretofore, the restrictions in the act of 1902 were in full force and

effect when the act of 1906 was passed. The latter statute merely extended the period of restrictions with some modifications.

The exact question in the case therefore is as to the constitutional power of Congress in dealing with full-blood Cherokee Indians still maintaining their tribal relations, and before the rights of any third parties have intervened, to extend for a further period the restrictions upon the alienation of the lands granted to them by the United States.

It is not necessary to recite the history of the Government's relations with the Indians, or even with the Cherokees in particular. They held their original territory in North Carolina and Georgia by right of occupancy only, with the fee in the United States. (*Mitchel* v. *United States*, 9 Peters, 711; *Clark* v. *Smith*, 13 Peters, 195; *United States* v. *Cook*, 19 Wall., 591; *Cherokee Nation* v. *Georgia*, 5 Peters, 1; *Beecher* v. *Wetherby*, 95 U. S., 517; *United States* v. *Kagama*, 118 U. S., 375.) The new lands in the west which they acquired by patent to the Cherokee Nation, were conveyed "*in exchange*" for the lands they had formerly occupied in the east. (4 Stat., 411; 7 Stat., 311; 7 Stat., 414; 7 Stat., 478; Lands of the Cherokee Nation, 1892, pp. 415–424.) When the Cherokees removed to Indian Territory, where they have continued to reside ever since, they held their tribal lands by the ordinary Indian title of occupancy, "assigned to them by the United States, as a place of domicile for the tribe" to be "held with the assent

of the United States and under their authority." (*U. S.* v. *Rogers*, 4 Howard, 567.)

The plenary power of the United States over the Indians so long as they maintain tribal relations, and particularly over their lands, has always been recognized. It arises not only out of the grant of power to Congress in Article I, section 8, of the Constitution, which declares that "Congress shall have power * * * to regulate commerce * * * with the Indian tribes," and in article 4, section 3, which provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," but out of the moral obligation of a civilized and superior nation to protect dependent and uncivilized peoples whom it has dispossessed of their domain.

As to the power of Congress to pass the act of April 26, 1906, we submit the following propositions:

> *First*,—treating these full-blood Cherokees as Indians, Congress had power to put any restrictions whatever and for any length of time upon their right to alienate their lands, so long as the interests of third parties had not intervened.
>
> *Second*,—no citizenship was ever conferred upon the Indians involved in this case.
>
> *Third*,—if any citizenship was conferred, it was only a limited or qualified federal citizenship in the territory and not inconsistent with the continued supervision over the alienation of their lands.

Fourth,—Congress never intended by the grant of citizenship to surrender its power to protect these Cherokee Indians, and especially to protect their property interests, for it has expressly continued their tribal government.

Fifth,—treating these full-blood Cherokees as incompetent citizens of a territory, Congress had power to designate them as a class who need its special protection in the disposition of their property.

We shall discuss these five propositions in their order.

FIRST.

Treating these full-blood Cherokees as Indians, Congress had power to put any restrictions whatever and for any length of time upon their right to alienate their lands, so long as the interests of third parties had not intervened.

From the very earliest times the United States in dealing with Indians has asserted the right to control the alienation of their lands at any time, so long as the lands were held by Indians. This power has been exercised time and again, not only by treaties and acts of Congress imposing conditions contemporaneous with the grants, but by statutes passed after title had vested in the Indians and after such title had become alienable, *except* for the restrictions upon alienation imposed by such subsequent legislation.

Mr. Justice Gray in *Jones* v. *Meehan* (175 U. S., 1) traces the interesting history of these statutes, together with the long line of cases involving the alienation of Indian lands and puts the proposition

beyond dispute, that Congress may at any time before an Indian has parted with an alienable estate in lands granted him by the Government, interpose limitations upon his disposition of the lands and protect him from his own improvidence.

As early as July 22, 1790 (1 Stat., 137, 138, ch. 33, sec. 4), Congress passed an act declaring that "no sale of lands made by any Indian or any nation or tribe of Indians within the United States shall be valid to any person or persons, or to any State," unless executed by some treaty under the authority of the United States.

On March 1, 1793, another act was passed, and the word "Indian" in the singular was omitted, the act providing that "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians within the bounds of the United States shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution." (1 Stat., 330.)

But in the still later acts of May 7, 1796, and March 3, 1799, the word "Indian" in the singular was again repeated and the act read as follows:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the Constitution. (1 Stat., ch. 46, p. 746.)

This identical language was repeated in the first permanent enactment upon the subject by the act of March 30, 1802. (2 Stat., 143.) And this remained the law until June 30, 1834, when Congress again left out the words "any Indian" and made the act read that "no purchase, etc., of lands, etc., of any Indian, nation or tribe of Indians, shall be of any validity," etc.

Thus for forty-four years it was unlawful for any individual Indian to sell his lands and for thirty-eight years even to lease or otherwise convey any of his lands except under the authority of the United States. And this authority over the disposition of lands belonging to individual Indians was exercised by Congress without respect to the terms or conditions of previous grants or treaties, and the constitutionality of such acts was not only never disputed, but it was expressly assumed in *Jones* v. *Meehan*, *supra*. In that case the court decides, first, that when the United States in a treaty cedes a tract of land to a chief or another member of a tribe the treaty itself converts the lands described into individual property, and unless the grant is accompanied by words limiting its effect it is equivalent to the conveyance of a complete title in fee simple; and, second, that where, as in that instance, Congress had not by any other act, either contemporaneous or subsequent, restricted the right of alienation, the Indian grantee had full power to dispose of his lands. The only reason why the learned justice who wrote the opinion in *Jones* v. *Meehan* took occasion to examine the

statutes from 1790 to 1834 was to ascertain whether or not any act of Congress was in force subsequent to the last-named date which would limit the right of the Indian chief whose lands were there involved and who had acquired them under the treaty of October 2, 1863, to lease them, as he had attempted to do, under the facts disclosed. Not finding any such statutory limitation, and finding that the Indian chief had attempted to make two leases, the court decided in favor of the first one and against the second, even though Congress, after the rights of a third party had intervened, undertook to control the disposition of the land. The court concluded its discussion of these statutes against alienation with these words:

> But the inference appears to us to be irresistible that Congress did not intend that there should thenceforth (that is after 1834) be any general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States. And this view is confirmed by the reenactment of the provision, in the very words of the act of 1834, in section 2116 of the Revised Statutes, etc.

It thus appears to have been conceded in *Jones* v. *Meehan* that Congress might at any time renew restrictions against the disposition of lands held by individual Indians, and if this be true it follows conclusively that Congress had full power in 1906 to extend the restrictions which it had imposed in 1902 upon the alienation of their lands by full-blood Cherokees whose property was still in process of allot-

ment, and who were still maintaining their tribal relations.

In *Smith* v. *Stevens* (10 Wall., 321) the precise question involved in the case at bar, stating it in terms most favorable to the contention of the appellants, to wit, whether Congress may by subsequent legislation control the disposition of lands granted to an Indian and still under his ownership, was before this court.

By a treaty of June 3, 1825, between the United States and the Kansas Nation of Indians (7 Stat., 245), it was provided in the sixth article thereof, that there should be reserved for the benefit of each of the half-breeds named therein (the defendant Victoria Smith being one), a certain specified allotment of land out of the quantity ceded by the nation to the United States. The eleventh article of the treaty contained the stipulation that the nation should not sell these lands without the permission of the Government, and one of the questions in the case was whether or not this prohibition applied to individual members of the tribe, *including* the half-breeds mentioned. But the court said: "It is, however, not necessary for the purposes of this suit to decide this point, as the deed in question was made after the passage of the act of Congress of the 26th day of May, 1860, which relieves the subject of all difficulty." (10 Wall., 325.) This statute of 1860, *passed thirty-five years after the grant* to Victoria Smith, forbade future disposition of the lands granted, except by the Secretary of the Interior on the request

of the party interested, and the court found that this act provided the only method by which the lands could be conveyed; that the sale attempted to be made in another way was void, and that the deed gave no title to the purchaser. This case is cited with approval in *Jones* v. *Meehan* (175 U. S., 1, 18, 19).

In the case of *The Kansas Indians* (5 Wall., 737, 757) this court, in speaking of the right of Congress over lands belonging to Indians, put the general doctrine thus:

> As long as the United States recognizes their national character, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.

In *Cherokee Nation* v. *Southern Kansas Railway Co.* (135 U. S., 641, 653) the court said:

> From the beginning of the government to the present time, they [the Indians] have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation* v. *Georgia* (5 Pet., 1, 17), "are considered by foreign nations, as well as by ours, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility."

In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294) the Supreme Court, referring to the case of *Stephens* v. *Cherokee Nation* (174 U. S., 445), said:

> The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate * * * directly for the protection of the tribal property, was in that case reaffirmed (p. 306).

And again:

> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts (p. 308).

The relation between the Government of the United States and the Indians has often been likened to that of guardian and ward, and it has often been said that anything which a guardian and a court of probate or of chancery may do for a ward Congress may do for the Indians so long as their tribal relations continue. (*Worcester* v. *Georgia*, 6 Peters, 515; *Elk* v. *Wilkins*, 112 U. S., 94, 96; *United States* v. *Kagama*, 118 U. S., 375; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553; *United States* v. *Rickert*, 188 U. S., 432.)

In *United States* v. *Kagama* (118 U. S., 375, 384) this court said:

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, *there arises the duty of protection, and with it the power.*

This has always been recognized by the Executive and by Congress, and by this court whenever the question has been raised. In the well considered case of *Beck* v. *Flournoy Co.* (65 Fed., 30, 34) this language is used:

> These limitations upon the power of the Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians.

The key to the whole matter is found in the language used by this court in the *Kagama* case, *supra*, to the effect that where there is a duty of protection to the Indians there arises the power to discharge it.

SECOND.

No citizenship was ever conferred upon the Indians involved in this case.

The chief claim of counsel for appellants in this case is that Brown and Gritts had become citizens of the United States, and that in some way this prevents Congress from further restricting the alienation of their lands. In the first place it is not clear that they have ever become citizens. Certainly Indians are not citizens under the Fourteenth Amendment, because they are not born "subject to the jurisdiction" of the United States and they are not "naturalized," because naturalization means the adoption of citizens of a foreign state and the Indian tribes are not foreign states within this view of the Constitution. (*Cherokee Nation* v. *Georgia*, 5 Peters, 1; *Holden* v. *Joy*, 17 Wall., 211, 242; *Elk* v. *Wilkins*, 112 U. S., 94.)

Certainly they have not been made citizens by the act of March 3, 1893 (27 Stat., 612, 645), which provides that the consent of the United States is given to the allotment of lands in severalty to individuals among the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, and that upon the allotment being made the individuals to whom the same may be allotted "shall be deemed in all respects citizens of the United States." These allotments, however, were made by the tribes themselves and not by the United States. Furthermore, neither Brown nor Gritts took any land under this allotment. Their

lands were secured under the allotment provided for in the act of July 1, 1902 (32 Stat., 716, 717, 726, 727, ch. 1375), and *this act contains no clause conferring citizenship.* The general policy of Congress has been not to grant citizenship in any case until the tribal relations and governments have ceased. This is indicated by the dealings with the Choctaws, Chickasaws, Creeks, and Seminoles, and it is not supposable that any different rule was intended to obtain in the case of the Cherokees. (30 Stat., 513, 518, 567.)

But appellants' chief reliance with reference to citizenship will doubtless be upon the general allotment act of February 8, 1887, as amended by the act of March 3, 1901. (24 Stat., 388, ch. 119; 31 Stat., 1447, ch. 868.)

The General Allotment Act of February 8, 1887, provided:

> SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian

born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. (24 Stat., 390.)

SEC. 8. That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order. (24 Stat., 391.)

The act of March 3, 1901 (31 Stat., 1447; ch. 868), amended the above section 6 thus—

That section six of chapter one hundred and nineteen of the United States Statutes at Large numbered twenty-four, page three hundred and ninety, is hereby amended as follows, to-wit: After the words "civilized life" in line thirteen of said section six insert the words "and every Indian in Indian territory."

But this same section 6 was again amended by the act of May 8, 1906 (34 Stat., 182; ch. 2348), so as to read as follows:

> SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and

> capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory. * * *

Of the above legislation it will be noted that it embraces in all its three stages two different cases to which two different rules were applied. The first case is that of Indians receiving allotments under the act of February 8, 1887, itself; and concerning such allotments it was declared that they should "have the benefit of, and be subject to, the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction, the equal protection of the law." That case and the rule just declared concerning it are not here involved, because none of the Cherokees have received allotments under the act of February 8, 1887. The second case covered by that statute is treated in the following sentence, quoted as it stood before the amendment of March 3, 1901:

> And every Indian born within the territorial limits of the United States to whom allotments

> shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. (Act of February 8, 1887, 24 Stat. 388, on p. 390; Ch. 119, Sec. 6).

The suit at bar is not affected by this form of section 6 of the act of February 8, 1887, because section 8 of the same act declared:

> That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, (and other Indians named.) (Id. sec. 8, 24 Stat., 391).

The question in the present suit concerning Cherokee citizenship is made by the amendment of March 3, 1901 (31 Stat., 1447), which added the words "and every Indian in Indian Territory" to section 6, at the end of the clause "and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his

residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life." It will be claimed that this addition of 1901 extended citizenship to every Indian in the Indian Territory, independently of his having taken up his residence apart from his tribe and "adopted the habits of civilized life," and even independently of his having received an allotment.

It is submitted, however, that the effect of the amendment of 1901 was only to extend the general clause, at the end of which the amendment was inserted, to Indians who had come to reside apart from their tribe and had adopted the habits of civilized life, although they dwelt in the Indian Territory. In other words, under the amendment of 1901 Indians in Indian Territory who lived by themselves and in a civilized way were put under the same rule as elsewhere. It is incredible that Congress intended that all Indians in Indian Territory should be made citizens in 1901 without their having either received allotments or taken up the habits of civilized life. This view is the only one which will make consistent the various acts of legislation on the subject. The act of February 8, 1887, contained in section 8 a provision that it shall not apply to certain Indians in the Indian Territory, including the Cherokees, while the amendment of 1901, without in terms repealing said section 8, declares that all Indians in the Indian Territory shall become citizens of the United States, and the act of May 8, 1906, omits the provision that all Indians in the Indian Territory shall become citizens of

the United States, and reenacts in effect old section 8 of the act of 1887 by declaring that the provisions with respect to citizenship *shall not apply to any Indians in the Indian Territory.*

Thus we have the act of 1887 granting citizenship to certain Indians and expressly withholding citizenship to the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and others; then the amendment of 1901, without repealing the exceptions as to the Cherokees and others, providing that all Indians in the Indian Territory, and certainly all Indians in that territory who have taken up civilized life apart from their tribes, shall be citizens of the United States, and finally the act of 1906 granting citizenship to certain Indians and expressly providing that it shall not apply to any Indians in the Indian Territory.

We submit that if this legislation is to be taken literally, without any attempt to reconcile it, the most that can be claimed with respect to the Cherokees is that Congress has apparently made them citizens of the United States from March 3, 1901, to May 8, 1906. This result follows if the amendment of 1901, declaring that after the words "civilized life" in section 6 of the old act of 1887 there should be inserted "and every Indian in the Indian Territory," actually conferred citizenship upon the Cherokees, for certainly the act of 1906, after expressly conferring citizenship upon certain classes of Indians, declares "that the provisions of this act shall not extend to any Indians in the Indian Territory."

The only way that these several acts can be harmonized is to construe the act of 1901 as not intended to apply to the Cherokees, but only to such Indians in the Indian Territory not designated by the exception in the act of 1887 and only to such of these Indians as have taken up civilized life apart from their tribes. But even if this act of 1901 be construed as applying to all Indians in the Indian Territory, including the Cherokees, it ought at least to be limited to such Indians, whether Cherokees or others, who have taken up the habits of civilized life and are living apart from their tribes. In either case the appellants here, Brown and Gritts, were not made citizens; first, because they are among the excepted Cherokees, and, second, because it does not appear that they have taken up civilized life apart from their tribe.

THIRD.

If any citizenship was conferred upon full-blood Cherokees, it was only a limited or qualified Federal citizenship and not inconsistent with the continued supervision over the alienation of their lands.

Appellants in this case unduly emphasize the importance of citizenship. In fact, they rest their whole case upon it. Their opinion seems to be that if these Cherokee Indians were citizens of the United States when the act of April 26, 1906, extending the restrictions upon their power to alienate their lands was passed, Congress could not enact any further legislation for their protection in the possession of

their lands. They apparently argue that the conferring of the rights of citizenship upon Indians brings them for the first time within the purview of the Fifth Amendment to the Constitution, and that thereafter, if Congress attempts to restrict them in the disposition of their lands, it has violated the guaranty against the taking of property without due process of law.

The fallacy of this argument is that the fifth amendment is not concerned with citizenship. It declares that "no *person* shall be * * * deprived of life, liberty, or property without due process of law." There is a fundamental difference between persons and citizens, and this is clearly shown by the language of the Fourteenth Amendment. That amendment forbids the States "to make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States;" but as to life, liberty, or property it declares that no State shall "deprive any *person* of life, liberty, or property without due process of law." Indians do not get any new or additional property rights by being made citizens.

The only real question is, What is due process of law with respect to the property of Indians? And this due process of law will be found in the consistent and immemorial attitude of the Government of the United States toward its Indian wards. There is nothing in the acquisition of citizenship of itself which changes that attitude, or which ought to change the national policy. Of course if Congress clearly expresses the purpose of putting an end to its rela-

tion of guardianship and frees itself in clear language from any further obligation in that respect, then a different situation will arise. But so long as Congress continues to exercise its control of Indians, and especially of their property, the courts will uphold its acts. As this court said *In re Heff* (197 U. S., 488, 499):

> It (Congress) may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end.

This attitude of the courts is further shown in the case of *Jones* v. *Meehan* (175 U. S., 1), where, after discussing the relation of Indian tribes to the Government, it was held that certain land reserved to an Indian by an act of Congress was alienable by his heirs after his death, because Congress had made clear its intention to free such land from further restrictions. The court says:

> The inference appears to us to be irresistible that Congress did not intend that there should thenceforth be any general restriction upon the alienation of individual Indians of sections of land reserved to them respectively by a treaty with the United States.

So Congress may partially withdraw its control of the Indians and their affairs. It may, as it did in the allotment act of February 8, 1887 (24 Stat., 388, chap. 119), provide that the Indians who received their allotments under that act shall "have the benefit and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying such Indian within its jurisdiction the equal protection of the law." If it does say this in plain and unmistakable language, it can not thereafter reassert federal control and penalize the sale of liquor within a State to an Indian who had been wholly emancipated from federal laws, both civil and criminal, and made subject only to state laws. This was the decision in the *Heff* case, *supra*, and is as far as it goes.

But in the case at bar, even if these full-blood Cherokee Indians had become citizens of the United States, Congress evinced no purpose to withdraw from them the protection of their property from improvident alienation. The legislation on the subject shows that Congress has intended to keep control of this subject. Before the time limit in the act of 1902 had expired, Congress passed the act of 1906 extending the restrictions imposed in the first statute.

That the grant of citizenship does not itself emancipate the Indian from federal control is shown by the fact that the act of July 1, 1902, under which Brown and Gritts received their allotments, imposed restrictions upon their alienation, although, as appellants claim, they were then citizens of the United

States under the act of 1901. They do not question here the validity of the act of July 1, 1902, because if they did they would not have any lands to contend about. But that very act which divided among the Cherokees tribal property, claimed by appellants to have been theirs by patent to the Cherokee Nation, which conferred a fee-simple title, provided that they should not alienate their homesteads within twenty-one years nor their other lands, whether allotted or inherited, within five years. Now, if Congress was without power to impose conditions as to alienation upon the lands which already belonged to the Cherokee Nation because the individuals to whom the allotments were made were citizens of the United States, then the act of 1902 is unconstitutional, the allotments under it were invalid, and the appellants have no case here to be considered. Nor does it help the matter any to say that the act of July 1, 1902, was ratified by the tribe. In the first place the Indians could not waive any rights they had as citizens, and if Congress was without power to impose restrictions upon the alienation of lands which already belonged to them in fee simple, the restrictions were void. And in the next place the ratification by the Cherokee tribe adds nothing whatever to the validity of the act of Congress, for, as this court has said in the *Intermarried White* cases (203 U. S., 76), this act of July 1, 1902, being ratified by the Indians affected, has been called a "treaty," "but it is only an act of Congress and can have no greater effect." (See also *Thomas* v.

Gay, 169 U. S., 264; *Cherokee Tobacco case*, 7 Wall., 621; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553.)

That Congress may continue to legislate with respect to the disposition of Indian lands, whether held by the tribe or by individual allottees and whether the Indians have become citizens or not, is well established in many cases.

In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), decided after the passage of the citizenship act of March 3, 1901, under which the appellants claim citizenship, and after the passage of the act of July 1, 1902, under which their lands were allotted, this court in discussing the effect of citizenship upon the congressional control of Indian lands, say:

> There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remained subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation.

In *Wiggan* v. *Conolly* (163 U. S., 56) certain lands allotted to the Ottawa Indians residing in the State of Kansas, under the treaty of July 16, 1862 (12 Stat., 1237), were made inalienable until "the expiration of the period of five years from the date of the ratification of this treaty," when the allottees shall become citizens of the United States. It so happened that they also became citizens of the State of Kansas at the

same time. Esther Wilson, to whom land had been allotted under the treaty and to whom a patent reciting the conditions of the treaty had been delivered on December 1, 1865, was a minor and a recognized enrolled member of the Ottawa tribe. On February 23, 1867, prior to the expiration of the five-year limit upon alienation, but subsequent to the delivery of the patent, another treaty was entered into extending the time when the allottees should become citizens of the United States two years, with the provision that all who desired to become citizens should make a declaration of their intention in a United States district court. The treaty, as afterwards amended and finally ratified on October 4, 1868, provided that adults and heads of families should receive patents in fee simple, "so that they may sell their lands without restriction." The guardian of Esther Wilson, under the order of the probate court of Franklin County, Kans., on October 26, 1872, sold her allotment to John Wiggin, from whom the appellants derived their title. The Supreme Court said (p. 62):

> It does not appear that the allottee in this case was the head of the family, and according to the testimony she was a minor. This treaty of 1867 introduced a new limitation upon the inalienability of lands patented to a minor allottee, that is, the limit of minority, and such limit must be applied to sales, voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that a patent to this allotment had already been issued did not abridge the right of the

> United States to add, with the consent of the tribe, a new limitation to the power of the individual Indians in respect to alienation. The land and the allottee were both still under the charge and care of the nation and the tribe, and they could agree for further protection, a protection which no individual was at liberty to challenge.

Of course, it will be observed that this case arose prior to the act of March 3, 1871 (16 Stat., 566), when Congress changed its policy and determined thereafter to deal with the Indian tribes by direct legislation instead of by treaty. Since that time (1871) this court has frequently decided that Congress has plenary power over Indian tribes and individuals so long as the tribal relations continue, and may now do by direct legislative enactment anything it could formerly have done by treaty. (*Lone Wolf* v. *Hitchcock*, 187 U. S., 553.)

In *Conley* v. *Ballinger* (216 U. S., 84, 91) is to be found the very latest expression on this subject, and there it is said that even a promise to a tribe rests for its fulfillment "on the good faith of the United States—a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indian."

It follows, therefore, that the case of *Wiggan* v. *Conolly*, just cited, establishes the proposition that without regard to the terms and conditions of a patent from the United States, and *without regard to citizenship*, Congress may extend the period within which the allottee may dispose of his lands.

In the case of *Thomas* v. *Gay* (169 U. S., 264, 274), this language is used:

> The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organization, may be conceded.

In *United States* v. *Rickert* (188 U. S., 432) the State of South Dakota undertook to tax lands patented to Indian allottees with certain restrictions upon alienation, and the Indians had become citizens not only of the United States, under the General Allotment Act of February 8, 1887, but of the State of South Dakota. The court, speaking through Mr. Justice Harlan, say:

> It is said that the state has conferred upon these Indians the right of suffrage and other rights that ordinarily belong to citizens, and that they ought therefore to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question which the courts can not determine. We can only deal with the case as it exists under the legislation of Congress (p. 445).

It is to be noted that while the court here declares that it is for Congress to determine when these Indians shall "assume the responsibilities attaching to citizenship," Congress had already declared them to be citizens of the United States, thus showing that

the citizenship conferred was qualified in character and not inconsistent with a continued supervision over their lands.

A number of Federal courts have considered the question as to the effect of citizenship upon the further right of Congress to impose restrictions upon the alienation of their lands. In *United States* v. *Flournoy, etc., Co.* (69 Fed., 886, 891), the claim was made that as the Indian to whom the land had been allotted had become a citizen of the United States, he ceased to be a ward of the Government, and that citizenship was inconsistent with the prohibition upon the alienation of his lands. But the court said:

> The right to alienate lands is denied to minors, and yet, during their minority, they may be citizens of the United States, with all the privileges and rights conferred thereby.

In *Hitchcock* v. *United States, ex rel. Big Boy* (22 App. D. C., 275), the Supreme Court of the District of Columbia in discussing the right of the Government to supervise the disposition of the proceeds derived from the sale of allotted lands, said:

> It is a daily experience that in the matter of wills, marriage settlements, deeds of trust, and other similar arrangements, property is tied up and the right of alienation and disposal of it is restricted; and yet it has never been supposed that thereby the right of citizenship of the grantor or beneficiary is impaired. The provisions made in the present and other similar cases for those who are or have been wards of the Government of the United States, are

> analogous to ordinary trusts wherein it is sought by restricting the right of disposal to guard the beneficiary against the result of his own improvidence; and we fail to find in either any impairment of the right of citizenship.

In *Beck* v. *Flournoy, etc., Co.* (65 Fed., 30) the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Thayer, held that although the act of 1887 made general allotments to Indians in severalty and granted them citizenship in the United States, nevertheless it was within the power of Congress to put restrictions upon the alienation of their lands, and that citizenship was not inconsistent with a limited right to dispose of their property.

In *Ross* v. *Eells* (56 Fed., 855) the United States Circuit Court sustained the claim of the plaintiffs that members of the Puyallup tribe in the State of Washington to whom allotments had been made, and who had become citizens of the United States and also of the State when admitted into the Union, had been emancipated from the control of Congress; but upon appeal to the Circuit Court of Appeals (64 Fed., 417), the decision of the lower court was reversed, the appellate court holding that:

> The Act of February 8, 1887 which confers citizenship, clearly does not emancipate the Indians from all control or abolish the reservations.

This case was carried on appeal to the Supreme Court of the United States, and the appeal was here dismissed. (163 U. S., 702.)

In *United States* v. *Thurston County, Nebr.* (143 Fed., 287, 288), the Circuit Court of Appeals held that the fact that Indian allottees had become citizens of the United States and of the State of Nebraska did not in anywise affect the power or duty of Congress to protect their property interests. The court said:

> Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government to control their property.

There is a fundamental difference between property rights and personal rights. In the *Heff* case (197 U. S., 488) this court was considering the application of criminal laws to the Indians when citizens of a State, and held that the United States having made the Indian in that case a citizen of the United States, and the Indian having become a citizen of the State in which he lived and made by act of Congress subject to the civil and criminal laws of the State, he was outside the reach of federal police regulations as to the sale of liquor to him.

So in *United States* v. *Celestine* (215 U. S., 278), even though the Indian there had been made a citizen of the United States under the general allotment act of February 8, 1887, yet since he was not made subject to the civil and criminal laws of the State or Territory where he resided, but was a citizen only by virtue of the second sentence of the act of 1887, which declared "that such Indians shall be citizens of the United States and entitled to all the rights, privileges,

and immunities of such citizens," nevertheless he continued to be under the jurisdiction of the United States and was subject to the act of March 3, 1885 (23 Stat., 385), which provided that Indians committing certain crimes against the person or property of other Indians or other persons within the boundaries of any State in the United States and within the limits of an Indian reservation, should be subject to the same laws and penalties and tried in the same courts as were all other persons committing any of such crimes within the exclusive jurisdiction of the United States. In other words, this court held, distinguishing the *Heff* case, that where the United States has not emancipated the Indian from federal control and subjected him to the civil and criminal laws of the State or Territory in which he resides, he continues subject to federal jurisdiction notwithstanding the fact that he may in express terms have been made a citizen of the United States.

Under all considerations there is this difference between the attitude of the Government as to the property rights of the Indians on the one hand and their subjection to local criminal laws on the other—that with respect to property rights the Federal Government may still protect the Indians and limit their power to dispose of their lands, although it may relinquish control of them in the matter of crimes against local authority. It is the same distinction that runs through the treatment by the States of minors. A child at an early

age may be subjected to the criminal laws and yet not have the right to dispose of his property. So in the treatment of the Indians it is a natural policy for the Government to subject them as far as possible to local laws and courts in the States or Territories with respect to crimes committed by them, and nevertheless withhold its consent to their subjection to the local laws with respect to the disposition of property. Yet in the *Celestine* case, even though there was there involved a criminal offense, and even though the Indian was a citizen of the Territory in which the offense was alleged to have been committed, yet, since it did not clearly appear that Congress had intended that he should be subject to the criminal laws of the Territory, which had subsequently become a State, the court held that the Indian was subject only to the federal jurisdiction.

In *United States* v. *Sutton* (215 U. S., 291) an indictment was found under the same statute as that involved in the *Heff* case, except that it was under a clause making it unlawful to introduce intoxicating liquors into the Indian country or upon any Indian allotment while the same should remain inalienable. The court held that indictment good, notwithstanding the fact that the Indian was a citizen of the United States under the act of 1887 and that the allotment was within the State of Washington, but because Congress had retained such control over the Indian's lands as to take them out of the jurisdiction of the

State and keep them within the jurisdiction of Congress. It is to be observed, further, that this act of 1897 was passed ten years after the lands had been allotted and after the Indian had been made a citizen.

The opinions in these three cases—*In re Heff*, *United States* v. *Celestine*, and *United States* v. *Sutton*—were written by Mr. Justice Brewer, and they not only disclose an intimate grasp of the subject but most convincingly support the proposition that even after an Indian has become a citizen of the United States and after his lands have been allotted to him in severalty Congress still possesses plenary power to legislate with respect to him and his lands, unless by its own act it has relinquished such power.

FOURTH.

Congress never intended by the grant of citizenship to surrender its power to protect these Cherokee Indians, and especially to protect their property interests, for it has expressly continued their tribal government.

As this court said in the *Heff* case (197 U. S., 488), and as it has said in many other cases, the intention of Congress to release federal control of the Indians and their affairs must be clearly expressed before the courts will assume the fact to be accomplished. Now, not only is there no indication in the present instance that Congress has intended to relieve itself of further obligation in the protection of the lands of full-blood Cherokee Indians, but it expressly and affirmatively appears that Congress intended, notwithstanding the grant to them of federal citizenship, to retain the

power of protecting their property interests. In the very act which, it is claimed, made them citizens, to wit, the act of February 8, 1887, as amended March 3, 1901 (24 Stat., 388; 31 Stat., 1447), it is declared that such grant of citizenship shall not in any manner impair or otherwise affect the right of "any such Indian to tribal or other property."

In fact, on the very day, to wit, March 3, 1901, when, appellants claim, they were made citizens by the amendment to the general allotment act of 1887, *Congress treated them as Indians and as members of an Indian tribe.* It provided that "no act, ordinance, or resolution of the Creek or Cherokee tribes, except resolutions of adjournment, shall be of any validity until approved by the President of the United States." (31 Stat., 1077.) Certainly, if Congress intended to make these full-blood Cherokees citizens of the United States, with all the privileges and immunities of such citizens and with full power to alienate their lands, it is remarkable that on the same day when they were invested with such citizenship Congress was legislating with respect to their tribal government and providing how its acts should be approved.

Further, if Congress intended by the act of March 3, 1901, to make the Cherokees citizens, with full power to alienate their lands, it is incredible that Congress should, a year later, to wit, on July 1, 1902, provide for an allotment of a portion of their lands in severalty, impose by that very act restrictions upon their right to alienate the lands, and then take a vote of the Indian tribe upon the subject.

The continuance of tribal government is utterly inconsistent with full citizenship on the part of the members of the tribe, and for even stronger reasons it is inconsistent with a withdrawal on the part of Congress of further control of Indian property. Now, the fact is well established that the tribal government of the Cherokee nation was, in 1901, when citizenship is claimed to have been granted, in 1902, when the lands here involved were allotted, in 1906, when the restrictions upon the alienation of such lands were extended, and is to-day, in existence and recognized by the political department of the United States.

The act of July 1, 1902, itself provided that the tribal government of the Cherokees should extend until March 4, 1906; and when that date arrived, it being discovered that the enrollment of the Cherokee Indians had not been completed, and that a large part of the tribal lands was still unallotted, Congress, by a joint resolution approved March 2, 1906 (34 Stat., 822), continued the tribal government in the following language:

> The tribal existence and present tribal government of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until the property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.

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Then, by the act of April 26, 1906, which extended the restrictions upon alienation, the tribal government of the Cherokees was further continued "until otherwise provided by law," and no act of Congress has since been passed abolishing such tribal government. At the present time there are still lands of the Cherokee Nation unallotted and tribal funds undistributed, for which lands patents must be issued and signed by the principal chief of the Cherokee Nation, as provided in section 58 of the act of July 1, 1902.

The appellants claim to be citizens, not only of the United States, but of the State of Oklahoma. In view of this contention, the fact ought to be noted that the State of Oklahoma was not admitted into the Union until November 16, 1907, whereas the act extending the period of restrictions, the validity of which is now in question, was passed April 26, 1906, and this suit was brought on March 16, 1907.

But the enabling act admitting Oklahoma into the Union as a State (34 Stat., 267), so far from disclosing an intention on the part of Congress to emancipate the Cherokee Indians or their lands from governmental control, expressly reserves such control in the Federal Government. Section 1 provided:

> That nothing contained in the State constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands,

> property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed (p. 267).

And the third clause of section 3 of said act provided—

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States (p. 270).

In *Draper* v. *United States* (164 U. S., 240) this court considered similar language in the Montana enabling act. The Montana act provided—

> That the people inhabiting the said proposed State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States (p. 244).

It is obvious that the clause of the Oklahoma act, "shall be and remain subject to the jurisdiction, disposal, and control of the United States," is the equivalent of the following in the Montana act: "shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Now, in the *Draper* case it was contended that the clause about the "absolute jurisdiction and control of the Congress of the United States" over the Indian lands forbade any state jurisdiction upon those lands—even to try a negro for murder of another negro thereon; and the basis of the argument was that otherwise this clause about absolute jurisdiction and control of the Congress added nothing to what preceded in the statute. Mr. Justice White, in the opinion, however, cited in answer the act of February 8, 1887, and other laws under which lands were to be allotted to the Indians in severalty and the allottees might become citizens and even personally subject to state laws; and he then said—

> From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the State to frus-

> trate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the State (p. 246).

No statement could more clearly show that it does not lie with the State to regulate the matter of alienation of allotted lands.

FIFTH.

Treating these full-blood Cherokees as incompetent citizens of a Territory, Congress had power to designate them as a class who need its special protection in the disposition of their property.

Even if it be admitted that these Cherokee Indians were made citizens of the United States and of the Territory of Oklahoma, in which they resided at the time this suit was brought, it is clear that Congress had power in its authority over the people of the Territory to treat them as a class not sufficiently competent to alienate or encumber their lands without the protection of the Government. Looking upon them not as Indians, but as dependent persons, unable to guard their own interests in dealing with shrewder and thriftier people who dwelt near them or among them, it was not only within the power but it was the duty of Congress to prevent the wasteful disposition of their lands.

The inhabitants of the District of Columbia are citizens of the United States and have "the rights,

privileges, and immunities of such citizens," but they are not citizens of a state or under state regulations. Congress may legislate with respect to them and fix the terms upon which minors or other incompetents may alienate their property. The instances of analagous restrictions upon infants and deficients are abundant and familiar. At common law we have the disability of infants and the incapacity of the idiotic and insane; the voidableness, at least, of drunkards' contracts; and even the chancery rules undoing alienations by expectant heirs, unless for ample consideration. (1 Page on Contracts, 1905, secs. 236–238; *Jenkins* v. *Pye*, 12 Peters, 241–255, 258.)

In some States neither males nor females under 21 can dispose of their personal property by will. No one will contend that the legislature is without power to extend the period of infancy from 21 years to 22 or later, or that such extension could not affect an infant's power to deal with previously acquired property, and yet that question is identical in principle with the one here prevented as to whether a prolongation of the restraints upon the alienation of their allotments by full-blood Indians could affect allotments received before the time when the restraints were extended.

It would seem unnecessary to urge that a classification of full-blood Cherokee Indians as incompetent for a prescribed period to manage their most important and indispensable property, to wit, their land, is not so arbitrary or unreasonable as to contravene the fifth amendment. Of the character and condition

of the full bloods in this case, the Court of Claims found that "they are uneducated and unable to speak the English language and have never before owned any alienable lands and, without governmental supervision, are incompetent to represent and protect themselves in the sale or leasing of their allotted lands" (14 Finding, Rec., 28).

Even white persons who have never been under the guardianship of the United States or the State in which they live, if incompetent either as a class or as individuals, may be placed under the care and supervision of a trustee, and that by a special act of the legislature of the State where such class or individuals reside. In *Rice* v. *Parkman* (16 Mass., 326), which has been extensively quoted by Judge Cooley in his work on Constitutional Limitations (pp. 117, 118), there was a statute already in force which granted to the courts the authority to order the sale of the lands of minors. Notwithstanding this fact, however, the legislature of the State passed a special statute empowering the father of certain minors, as guardian for them, to sell their lands and put the proceeds out at interest for their benefit. The validity of the statute being challenged, it was upheld, and the court said, among other things:

> This power must rest in the legislature in this commonwealth; that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

Judge Cooley also quotes a paragraph from the opinion in the case of *Cochran* v. *Van Surlay* (20 Wend., 365, 373), to the following effect:

> A similar statute was sustained by the Court for the Correction of Errors in New York. "It is clearly," says the Chancellor, "within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the *superintendence, disposition, and management of the property and effects* of infants, lunatics, *and other persons who are incapable of managing their own affairs.*"

CONCLUSION.

The act chiefly complained of in this case, which extended the period of restrictions upon the alienation of the lands of full-blood Cherokees from five to twenty-five years on their surplus lands, and from twenty-one to twenty-five years on their homesteads, was passed solely in the interest of and for the benefit of the Indians. The United States has no pecuniary interest in the matter whatever, except as Congress may foresee that if these wards of the Government are permitted to dissipate their property they may once more be entirely dependent upon the bounty of their guardian.

This act of Congress takes no property from any Indian. As this court said, in speaking of similar legislation, in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), "There is no question in this case as to the taking of property." On the contrary, the sole purpose of this legislation is to make the Indians

secure in the possession of their property. It takes nothing from them, but, on the contrary, is designed merely to insure their keeping what they have.

This act of April 26, 1906, was passed, as the court below found from the testimony (Rec., 28), because many of the full blooded Cherokee Indians "had been induced by designing persons to execute deeds of their allotted lands * * * at grossly inadequate compensation;" and this unfortunate situation is further disclosed by the fact that the United States has brought, on behalf of such Indians, suits to set aside deeds, contracts, and mortgages embracing more than twenty-five thousand transactions. (Rec., 28).

The allotments provided for in the act under which the appellants secured their lands are still being made, and yet, while Congress is continuing to deal with these Indians in their tribal relations and is continuing to parcel their lands among them, the claim is made that Congress is without power to extend restrictions upon the alienation of such lands.

In the last analysis the contention of counsel for the appellants is that these full-blood Cherokees are in precisely the same position as competent white citizens who have received a fee-simple title to real estate. If that be true, then the whole policy of the Government in its dealings with the Indians from the time when the first statute, in 1790, forbidding the alienation of their lands was passed, has proceeded on an indefensible theory.

We submit that there are no inducements in this case to justify a departure from that policy and, least of all, to incline the court to interfere with the plan adopted by Congress. If there is doubt as to the wisdom of that plan, the objection should be addressed to Congress; and if Congress is doubtful about it, the legislation should be reconsidered or repealed.

Of more importance, however, than any other consideration which should induce to the judicial support of this legislation is the fact that the Cherokees themselves have intervened in this case for the protection of their own citizens and desire that the act passed in their interest and for their benefit shall be sustained.

The judgment of the Court of Claims should be affirmed and the petition dismissed.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney-General.

NOVEMBER, 1910.

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